JUN 10 2005

No. 04-1066

IN THE

Supreme Court of the United States

Illinois,

Petitioner,

v.

Michelle L. Bartels.

On Petition for a Writ of Certiorari
to the Appellate Court of Illinois

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether the Illinois trial and intermediate appellate courts correctly held, on the distinctive facts of this case, that police officers' search of a vehicle that had pulled over voluntarily after a traffic accident was undertaken without any reasonable suspicion and thus violated the Fourth Amendment.

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STATEMENT

This case involves a complicated factual scenario in which a driver's voluntary decision to pull over after a fender bender escalated into a police encounter, (arguably) a traffic stop, an arrest for a vehicle-related misdemeanor, two independent sessions of free-floating investigative questioning, and ultimately a search discovering illegal drugs. As Justice Schmidt noted below, "this clearly was not" a "routine traffic stop." Pet. App. 11a (dissenting opinion). Petitioner advanced before the Appellate Court of Illinois – which agreed with the trial court that the drug evidence should be suppressed – no fewer than four different theories of the case: that the officers' actions did not constitute a traffic stop at all; that the officers' drug-related questioning was within the scope of the initial encounter; that the officers acquired reasonable, articulable suspicion of drug possession during the course of their accident investigation; and that respondent consented to the search that revealed the drugs. The courts below implicitly rejected each of these theories in the course of reaching their conclusion that petitioner's conduct violated the Fourth Amendment.

Before this Court, however, petitioner has dramatically recast its argument, claiming for the first time that the case squarely presents a different and supposedly often-litigated question of law: whether the Fourth Amendment – either generally or as inflected through *Terry* v. *Ohio*, 392 U.S. 1 (1968) – prohibits law enforcement officers who have made a lawful traffic stop from conducting questioning unrelated to that traffic violation. By failing to either raise or preserve this question in any of the three courts below, petitioner has long since waived its ability to raise it on appeal to this Court. See, *e.g.*, *Sullivan* v. *Edward Hosp.*, 806 N.E.2d 645, 661 (Ill. 2004) (noting that as a matter of Illinois law, "[i]t is quite established that issues not presented in the petition for leave to appeal are not properly before [the Illinois Supreme] [C]ourt and are deemed waived"). The state courts have not

had an opportunity to address this issue in the first instance, and this case lacks many factual and factual-legal findings that would be necessary for its resolution. Cf. *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969). Indeed, petitioner's position in the lower courts was dramatically inconsistent with the position it now takes: if this Court accepts any of the many arguments the State proffered below, then this case does not present the question on which it now seeks review.

Even when this question has been properly presented, this Court has consistently declined to review it, including just last Term in a similar petition from this same petitioner. See *Illinois* v. *Bunch*, 541 U.S. 959 (2004) (No. 03-774); see also *United States* v. *Childs*, 537 U.S. 829 (2002) (No. 01-9795); *United States* v. *Williams*, 535 U.S. 1019 (2002) (No. 01-1422); see also *infra* at 8-9.

But even if this Court were to reverse course and to conclude that this question merits review, this case is an exceptionally poor vehicle for undertaking it. Given the ambiguities in the record and in the unpublished decisions of the trial and intermediate appellate courts, there is a significant risk that antecedent issues – such as whether this case involves a traffic stop at all – would prevent this Court from even reaching the question presented. If, as petitioner contends, the question presented involves a recurring issue as to which courts across the nation actually require more guidance, then surely a cleaner vehicle for providing that elaboration will soon appear.

1. On the evening of June 21, 2002, respondent and a companion, John Zaloudek, were traveling on Interstate 80 in Grundy County, Illinois. Zaloudek was driving the car (a compact Chevrolet Cavalier rented by respondent) while respondent slept in the passenger seat. Pet. App. 3a; Transcript of Motion to Suppress, Part 2, at 5, *People* v. *Bartels*, No. 02 CF 86-2 (Ill. Cir. Ct. May 15, 2003) (hereinafter "TM2"). While passing the scene of an unrelated accident, the car in which Zaloudek and respondent were

traveling and another vehicle (a Chevrolet Suburban) collided. Pet. App. 3a. After the two vehicles passed the scene of the unrelated accident, they both pulled over to the shoulder. *Ibid.*

Once Zaloudek had stopped the car, he woke respondent, told her about the accident, TM2 at 5, and left to speak with the driver of the Suburban. Transcript of Motion to Suppress, Part 1 at 15, *People* v. *Bartels*, No. 02 CF 86-2 (Ill. Cir. Ct. Jan. 6, 2003) (hereinafter "TM1"). After Zaloudek had left the car, respondent decided to drive for the remainder of the trip and she moved from the passenger seat to the driver's seat. TM2 at 6. Thus, when Zaloudek returned to the car, he sat down in the passenger seat. TM1 at 15.

The driver of the Suburban had informed Illinois State Police Trooper Brad Sprague of the fender bender as he passed Sprague, who had been directing traffic at the scene of the earlier accident. Pet. App. 3a. Ultimately, Sprague left the scene of the earlier accident and drove his patrol car to where respondent and Zaloudek were now parked. *Ibid.*

Upon his arrival, Sprague did not proceed with a straightforward accident investigation. (For example, he candidly acknowledged that he did not "put a pen on a crash report" before asking respondent whether she had anything illegal in her car, TM1 at 32, and in fact filled out that report only when he later returned to the station, long after the events in this case occurred, *id.* at 69.) At no time before arresting respondent did Sprague ask respondent or Zaloudek about the cause or circumstances of the accident that Sprague had ostensibly stopped to investigate. *Id.* at 37; TM2 at 37. Nor did he ask for driver information, licenses, registration, or insurance information from the Suburban. TM1 at 36.

Instead, after speaking to the driver of the Suburban for approximately thirty seconds, TM1 at 13, 52, Sprague approached respondent's car. He noticed that Zaloudek, whom he had seen driving when the two cars had passed him

while he was still directing traffic, was now in the passenger seat, and respondent was in the driver's seat. Pet. App. 3a.

Sprague asked Zaloudek to get out of the car and questioned him out of earshot of respondent. TM2 at 6-7. Zaloudek was unable to provide Sprague with a driver's license and ultimately acknowledged that his license had been revoked. Pet. App. 3a. At that point, Sprague informed Zaloudek that he would be arrested for driving on a revoked license – a misdemeanor under Illinois law. *Ibid.*; see 625 ILL. COMP. STAT. 5/6-303 (2005).

To verify Zaloudek's identity, Sprague asked whether Zaloudek had any other form of identification. Pet. App. 3a. When Zaloudek told Sprague that his identification was in respondent's purse, Sprague returned to the car and asked respondent (who on Sprague's own account could have had nothing to do with the accident he was investigating) to provide him with Zaloudek's identification. *Ibid.* When respondent could not locate the identification, Sprague asked for and received consent to search her purse. *Id.* at 4a. Sprague found neither Zaloudek's identification nor any other suspicious or incriminating information during this search. *Ibid.*

Nonetheless, Sprague abandoned any pretense of investigating the minor traffic accident. For example, Sprague did not ask respondent for her insurance information, her driver's license, how the crash occurred, or other information he needed for his accident report. TM1 at 35. Instead, Sprague initiated an investigation into whether respondent was carrying any illegal material in the car, apparently based on the fact that respondent had appeared "extremely nervous." Pet. App. 3a-4a. According to Sprague, after some brief questioning, respondent consented to a search of the car. TM1 at 71. According to respondent, however, she did not give any such consent. Pet. App. 5a.

Before Sprague himself could conduct the search, however, he received a status call from his dispatcher and returned to his patrol car to respond. Pet. App. 4a.

At some point during Sprague's questioning of Zaloudek and respondent, a second officer, Chad Brody, had arrived at the scene.[1] *Id.* Sprague did not discuss any of the details of his investigation with Brody, but simply instructed Brody to wait with Zaloudek. *Id.*; see also TM1 at 86, 92, 94-95, 97. Although Brody testified that "[i]t wasn't my job to investigate the accident," TM1 at 102; see also Pet. App. 4a, he nevertheless launched a second investigation of respondent while Sprague answered the status call. Pet. App. 4a. In response to Brody's questioning, respondent explained that she had been asleep during the accident and mentioned that the car was rented. *Id.* at 102-04. Brody then asked to see the rental agreement. *Id.*

The trial court, in its two-page order, made minimal findings of fact about the critical events that followed, and the record contains conflicting accounts regarding matters the trial court did not resolve. See Order of Circuit Court at 2, *People* v. *Zaloudek*, No. 2002-CF-86-1, 2002-CF-86-2 (July 3, 2003) [hereinafter Trial Court Order]. According to Brody, respondent voluntarily started looking around the car for the rental agreement. TM1 at 105. When she found nothing in the glove box, Brody suggested that respondent look in the center console. TM1 at 107. According to Brody, although respondent had been calm until this point, she now began to shake. TM1 at 121-22. Respondent's nervousness and her refusal to open the console led Brody to suspect that there were drugs in the car. Pet. App. 4a-5a. He then asked for permission to search the vehicle, which he claims respondent granted. TM1 at 128.

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[1] Along with Sprague, Brody had been working at the scene of the first accident. When that accident had been cleared up, Brody saw Sprague pulled over slightly down the road, and decided to assist him. TM1 at 88-92.

Respondent's version differs in several material respects. According to respondent, Brody told her to look in the glove box for the rental papers. TM2 at 9. When no papers were found there, Brody instructed her to search the center console. *Ibid.* Respondent informed Brody that she did not have the papers because she had left them at home. *Ibid.* Brody then demanded again that she look in the center console and stated that if she refused he would get his dog. *Id.* at 9-10. According to respondent, Brody never asked for consent to search the car. *Id.* at 11.

The record is also both incomplete and inconsistent with respect to the length of the stop and the time frame of the encounter. The trial court made no findings about the precise sequence of events or whether the drug investigation lengthened the detention beyond what a straightforward accident investigation would have consumed. See Trial Court Order at 1-2. Indeed, even the testimony from the officers varied widely on this point. See, *e.g.*, TM1 at 39 (Sprague's testimony that only five minutes elapsed between his arrival at the scene and when he asked respondent if she had any contraband in her car); *id.* at 96 (Brody's testimony that the encounter may have lasted as long as a half-hour); *id.* at 39 (Sprague's testimony that he returned to his car for only a minute or two); *id.* at 100 (Brody's testimony that Sprague may not have returned for five minutes). Respondent testified that it took close to twenty minutes between Sprague's arrival and the canine search. TM2 at 27-28.

Shortly after whatever point Brody retrieved his dog from the squad car, the dog indicated for drugs in respondent's car. Pet. App. 5a. A search of the center console revealed cocaine and heroin. *Ibid.* Both Zaloudek and respondent were then arrested. TM2 at 37.

2. Respondent was charged with two drug offenses. She filed a motion to suppress evidence and quash her arrest. Pet. App. 2a. The trial court granted the motion. Its order stated that the questioning and search were not supported by any

independent reasonable and articulable suspicion, and that any drug suspicion was not reasonably related to the original contact with respondent. See *id.* 5a (discussing the trial court's ruling).

3. Petitioner appealed to the Appellate Court of Illinois. Petitioner conceded that the constitutionality of traffic-stop questioning was properly governed by the Illinois Supreme Court's decision in *People* v. *Gonzalez*, 789 N.E.2d 260 (Ill. 2003), and petitioner did not contest the legal underpinnings of that case or otherwise preserve any challenge to the propriety of the *Gonzalez* decision. See, *e.g.*, Pet. Ill. Ct. App. Br. 14, 20. Instead, it argued variously that (1) there had been no traffic stop at all, *id.* at 10-13; (2) the officers' questioning was related to the initial purpose of the stop, *id.* at 16-17, 20; (3) Sprague's questioning was supported by independent reasonable suspicion, *id.* at 17-18, 20-21; and (4) Sprague's questioning did not lengthen the stop or alter its fundamental nature, *id.* at 18, 21-22.

The Illinois Appellate Court affirmed the decision of the trial court in an unpublished, nonprecedential order. Pet. App. 2a. It held that, although the initial stop was justified by the need to investigate an accident and Sprague had probable cause to question Zaloudek about his license and to request his identification from respondent, the questions to respondent about contraband in the car "impermissibly expanded the scope of the traffic stop" because they "had no direct relation to the initial justification of the stop." *Id.* 7a, 8a.

The court analyzed the Fourth Amendment issue independently with respect to the two officers. As to Sprague, the court held that he had "impermissibly prolonged the detention or changed the fundamental nature of the stop * * * [r]egardless of the length of the detention," Pet. App. 9a, because he undertook his drug investigation without having any reason for doing so. Nothing about respondent's conduct "create[d] a reasonable, articulate [*sic*] suspicion that the

vehicle contained contraband." *Id.* With respect to Brody, who actually conducted the search, the court held that his observations provided no justification for a search of the vehicle because "the record does not indicate that he smelled drugs, noticed drug paraphernalia, or observed any unusual drug-related behavior by the defendant." *Id.* 10a. Thus, his "continued questions and his threats of a canine search * * * significantly changed the nature of the investigation." *Id.* 11a.

4. Petitioner sought leave to appeal to the Illinois Supreme Court. Again, it implicitly conceded the correctness of *Gonzalez* and did not ask that the Illinois Supreme Court reconsider that holding or otherwise preserve the issue for further review. See, *e.g.*, Petition for Leave to Appeal in Illinois Supreme Court 12, 17 [hereinafter PLA]. Instead, petitioner simply repeated the arguments that it had made to the intermediate appellate court: there was no traffic stop, *id.* at 10-12; the questioning was related to the initial purpose of the stop, *id.* at 13-15, 17; the questioning was supported by independent reasonable suspicion, *id.* at 15, 17-18; and the questioning did not prolong the detention or change its fundamental nature, *id.* at 16, 18. The Illinois State Supreme Court denied petitioner leave to appeal on those questions. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

Petitioner now raises for the first time an issue over which it claims that "[c]ourts across the Nation have long been deeply split," Pet. 5, namely, what limits the Fourth Amendment imposes on police questioning "during a lawful traffic stop." *id.* i. This Court has recently denied certiorari to petitions raising this issue no fewer than three times. See *Bunch*, 541 U.S. 959 (No. 03-774) (presenting question: "After a police officer has lawfully stopped an automobile for a traffic violation, arrested the driver, decided to impound the vehicle, and ordered a passenger to exit the car, may the officer question the passenger and request identification in the

absence of reasonable suspicion that the passenger is engaged in criminal activity[?]"); *Childs*, 537 U.S. 829 (No. 01-9795) (presenting question: "Whether questioning during a traffic stop about a matter beyond the scope of the reason for the traffic stop that is not otherwise supported by reasonable suspicion violates the Fourth Amendment?"); *Williams*, 535 U.S. 1019 (No. 01-1422) (presenting question: "Did [a] trooper's questioning [about a suspect's travel plans] exceed the permissible scope of the stop for speeding?").

There is no reason for the Court to reverse course now and to grant this petition. The state of the law has not changed materially since these denials – particularly so because the most recent one came just last Term in response to a petition by this same petitioner that raised a substantially similar argument and cited many of the same cases. See Pet. for a Writ of Cert. 12-13, *Illinois* v. *Bunch*, 796 N.E.2d 1024 (Ill. 2003), *cert. denied*, 541 U.S. 959 (2004) (No. 03-774). Certainly the instant case – an unpublished opinion from an intermediate state appellate court with no precedential value even in Illinois, see ILL. SUP. CT. R. 23(e) – effects no change in the state of the law that would command this Court's attention.[2]

As the Solicitor General has persuasively argued, there is moreover no conflict among the lower courts on the question presented. See Brief for the United States in Opposition, *United States* v. *Childs* 6-11, 277 F.3d 947 (CA7), *cert. denied*, 537 U.S. 829 (2002) (No. 01-9795) [hereinafter U.S. *Childs* BIO] (discussing the absence of a circuit split on the issue of traffic-stop questioning). To be sure, courts that have confronted this issue have articulated the governing legal standard using different verbal formulations. But petitioner fails to demonstrate that those formulations actually produce

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[2] The Illinois Supreme Court's refusal to grant petitioner leave to appeal the intermediate court's decision in no way signifies its agreement with the reasoning of or result reached by the lower court. See *People* v. *Vance*, 390 N.E.2d 867, 872 (Ill. 1979).

different *results* in cases with similar facts – *i.e.*, that there is a "genuine conflict, as opposed to a mere conflict in principle," Pet. 8 (quoting ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 226 (8th ed. 2002)).

Even if there were such a conflict, this case would be absolutely the wrong vehicle for addressing it. In order to reach the question presented, this Court would have to resolve, or ignore, a slew of preliminary issues, any one of which might short-circuit this Court's inquiry. If petitioner is right that there is in fact an important and recurring question of Fourth Amendment law regarding questioning at traffic stops, surely a case cleanly presenting that issue will soon come before this Court. Thus, this Court need not, and should not, take a case in which it can reach that issue only by conducting a series of discrete, antecedent factual inquiries, particularly when those issues have not been elucidated by the lower courts.

I. The State of the Record in This Case Threatens to Prevent the Court from Even Reaching the Question Presented.

As Justice Schmidt noted below in his dissenting opinion in the intermediate court of appeals, this case conceivably could be resolved under "numerous theories," Pet. App. 14a, only one of which even arguably involves the constitutionality of traffic-stop questioning. Thus, if the Court were to grant certiorari, it would be faced with two unappealing options regarding how to proceed on the merits. First, it could choose to address these theories and hope that they are resolved in such a way that the case still presents an outcome-determinative question regarding the constitutionality of traffic-stop questioning. Second, it could ignore them and proceed on a number of artificial premises that run counter to petitioner's consistent position in the lower courts.

Neither of these scenarios is a productive use of this Court's resources. The first raises the very real and

unfortunate prospect that, after full briefing and oral argument, the Court would be forced to dismiss the writ as improvidently granted. Cf. *Medellin* v. *Dretke*, No. 04-5928, slip op. at 4, 6 (May 23, 2005) (per curiam) (dismissing writ as improvidently granted because "[t]here are several threshold issues that could independently * * * render advisory or academic our consideration of the questions presented" and concluding that "it would be unwise to reach and resolve the multiple hindrances to dispositive answers to the questions presented"). The second would create confusion among the lower courts regarding this Court's approval or disapproval of various aspects of this case, and the Court would almost certainly have to grant certiorari in one or more follow-on cases to clarify whatever holding it might reach in this one.

There are no fewer than six preliminary issues – most of them emphasized by petitioner below but ignored by it now in its attempt to portray this case as presenting a certworthy question. Cf. Pet. App. 11a (Schmidt, J., dissenting) ("[t]he majority attempts to classify this encounter as a routine traffic stop, which it clearly was not"). On four of these, petitioner itself argued in the courts below a position that, if accepted, would prevent the court from reaching the question it now presents:

1. *The Existence of a Traffic Stop.* Despite the fact that the questions on which petitioner seeks this Court's review depend on this case involving a "lawful traffic stop," see Pet. i, petitioner consistently argued below that this case does *not* involve such a stop. In the lower courts, petitioner asserted that the officers were acting in their "community caretaking" capacity, as described by this Court's opinion in *Cady* v. *Dombrowski*, 413 U.S. 433 (1973). See PLA 10-12; see also Pet. Ill. Ct. App. Br. 10-13. Petitioner based this conclusion on the uncontested fact that the police were not responsible for respondent's car stopping along the side of the road. Instead, the car in which Zaloudek and respondent had been traveling stopped of its own accord when Zaloudek and the

driver of the other car involved in the accident voluntarily pulled over to exchange information.

Respondent has consistently maintained, and the courts below agreed, see Pet. App. 7a, that the officers' behavior in keeping respondent and Zaloudek at the scene *did* constitute a seizure for Fourth Amendment purposes. Under her view of the facts, which both the trial and intermediate appellate courts adopted, the officers were not entitled to question her absent reasonable suspicion to believe that she was engaged in criminal activity, a suspicion they lacked. See Pet. App. 8a-11a; Trial Court Order at 2.

Petitioner must have recognized, however, that the question of when an entirely unofficial cessation of movement becomes a seizure for Fourth Amendment purposes does not warrant this Court's review, as there is no conflict on this question among the lower courts. And it is surely aware that this Court does not sit as "a court for correction of errors in factfinding," *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Thus, it has downplayed, perhaps only temporarily, its factual claims about the nature of the encounter in this case.

If this Court wants to resolve the issue of traffic-stop questioning, it should select a case that unambiguously involves a traffic stop. In contrast, the idiosyncratic nature of both Sprague's and Brody's presence on the scene, and the "unusual circumstances" of this case in general, Pet. App. 9a, suggest that this case may well turn on "a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity." *Massachusetts* v. *Sheppard*, 468 U.S. 981, 988 n.5 (1984).

2. *The duration of the stop and contraband questioning.* Although the parties dispute how long the stop lasted, see *supra* at 6, the trial court's order contains no factual findings whatsoever regarding the disputed question of the amount of

time that the officers spent questioning respondent about contraband. See Trial Court Order at 1-2.

The lack of any findings on this issue makes this case a flawed vehicle for resolving any question about the constitutionality of conducting unrelated questioning at a traffic stop because every federal court of appeals and state supreme court to have addressed the question agrees that the duration of questioning is *highly* relevant to the Fourth Amendment reasonableness inquiry that governs traffic stops.[3]

The state of the record here will make it impossible for this Court to address that critical issue of unreasonable length. There is simply no way for the Court to determine how long the questioning actually lasted, and thus, this case is unlikely to enable the Court to issue more general guidance on the

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[3] See *United States* v. *Burton*, 334 F.3d 514, 519 (CA6 2003) (holding that the challenged stop was constitutional because its scope and duration were reasonable), *cert. denied*, 540 U.S. 1135 (2004); *United States* v. *Childs*, 277 F.3d 947, 952 (CA7) (noting that "[q]uestioning that prolongs the detention, yet cannot be justified by the purpose of such an investigatory stop, is unreasonable under the fourth amendment"), *cert. denied*, 537 U.S. 829 (2002); *United States* v. *Holt*, 264 F.3d 1215, 1230 (CA10 2001) (en banc) (holding that Fourth Amendment reasonableness is to be judged by examining duration and manner of stop); *United States* v. *Ramos*, 42 F.3d 1160, 1164 (CA8 1994) (concluding that "continuing to detain the defendants after their licenses and registration had been checked was a violation of the Fourth Amendment"), *cert. denied*, 514 U.S. 1134 (1995); *United States* v. *Shabazz*, 993 F.2d 431, 436 (CA5 1993) (stating that questioning unrelated to the purpose of the stop can impermissibly extend its duration and thus render it unconstitutional); *State* v. *Akuba*, 686 N.W.2d 406, 415 (S.D. 2004) (same); *State* v. *McKinnon-Andrews*, 846 A.2d 1198, 1203 (N.H. 2004) (stating that a question would violate the Fourth Amendment if "in light of all the circumstances, the question impermissibly prolonged the detention"); *Gonzalez*, 789 N.E.2d at 270 (same).

dividing line between constitutionally reasonable and unreasonable stops.

Moreover, the durational issue is further clouded by a lack of clarity regarding how long the encounter *should* have lasted. In the mine run of cases where a single vehicle is stopped for an observed traffic violation, there is a clear-cut *terminus ad quem* to the initial seizure: absent the unrelated questioning, the motorist would presumably have been free to leave as soon as the officer had run a license check and issued a citation. However, the "unusual circumstances" of this encounter, Pet. App. 9a, differed in at least three important ways, and thus taking this case would not provide the Court with an opportunity to clarify the law with respect to that far broader category of cases. First, ambiguity regarding the proper scope of the stop, see *infra* at 14-16, necessarily creates uncertainty regarding its proper length. Second, even accepting Sprague's interpretation – that nobody was free to leave until he obtained all of the information necessary to complete an accident report, Pet. App. 7a – the codependent nature of the officers' interactions with the two vehicles distinguishes this from the typical one-car traffic stop. Finally, Sprague's decision to arrest Zaloudek *before* starting to question respondent changed the nature of the encounter even from what might be normal for such a multiple-vehicle investigation.

Granting certiorari here would likely commit the Court to granting review in at least one additional case that, unlike this one, contains factual findings regarding both the actual and the otherwise proper length of the investigation in question. Because the *entire* issue of traffic-stop questioning – including, but not limited to, proper length – could be resolved in such a case, nothing would be gained by granting certiorari now.

3. *The scope of the officers' investigation.* The decisions of the trial and intermediate appellate courts rest on a conclusion which respondent pressed before those courts and

continues to maintain, that the questioning in this case "was not reasonably related to the original contact with *defendants*." *Trial Court Order at 2*; *see also* Pet. App. 8a. Perhaps it is thus understandable that petitioner frames the issue before this Court as whether the Fourth Amendment prohibits questioning "unrelated to the traffic violation that justified the stop." Pet. i.

But neither opinion below ever specified precisely which "traffic violation" was involved in this case.[4] There are two possibilities, and they point in dramatically different directions. Undoubtedly, Zaloudek committed a traffic violation by driving with a revoked license. If *that* is the sole relevant violation, then questioning regarding drugs or other contraband is unrelated to the violation, because the fact that a motorist has an invalid license is not closely related to non-vehicular criminality. If this Court were to agree with petitioner's position in the courts below that no stop occurred until Sprague discovered this violation and arrested Zaloudek and simultaneously to agree with respondent's position that the questioning was unrelated to any justification for a stop, then the relationship between the violation and the questioning would pose no obstacle to reaching the question presented.

But it is entirely possible to reach a different conclusion. Respondent argued below, and the courts seemingly agreed, that Sprague made his decision to seize Zaloudek and respondent *before* he was aware of the license-related violation. See Pet. App. 7a (noting that Sprague's "purpose

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[4] Thus, this case is quite different from the mine run of traffic stop cases that produce evidence of other crimes, in which some clearly specified vehicular violation leads to an officer pulling over a motorist. See, *e.g.*, *Arkansas* v. *Sullivan*, 532 U.S. 769 (2001) (speeding and improperly tinted windshield); *Ohio* v. *Robinette*, 519 U.S. 33 (1996) (speeding); *Whren* v. *United States*, 517 U.S. 806 (1996) (turning without signaling and driving at an unreasonable speed).

for the stop was to investigate an accident and complete an accident report" and that he had testified that "once he began his investigation, no one was free to leave"). Under this scenario, the relevant "traffic violation" might be construed to concern Zaloudek's driving and the fender bender that led Zaloudek and the driver of the Suburban to pull over "without the trooper's direction." Trial Court Order at 1. Under this scenario, petitioner has argued that the officers' questioning was *not* "unrelated to the traffic violation," Pet. i, because the officers' purpose was to investigate the accident and its causes, including the possibility of narcotics use. Pet. Ill. Ct. App. Br. 16-17, 20; PLA 13-15, 17. But neither court below made any factual finding as to whether either officer had reason to believe that Zaloudek had committed a moving violation that might suggest he was driving while impaired. Without deciding that antecedent question – a determination involving not only facts that are absent from the record but also questions of Illinois law that this Court is ill-suited to address – this Court will find itself adjudicating a case on the basis of an artificial, highly stylized version of the facts and a petitioner's embrace of an internally incoherent theory of what actually occurred.

4. *Whether the officers had independent reasonable suspicion to ask respondent about contraband.* Although the lower courts determined that questions regarding contraband were not supported by reasonable suspicion, Trial Court Order at 2; Pet App. 9a, 10a, this Court subjects such determinations to *de novo* appellate review. *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996). Petitioner notably has argued throughout this case that the officers *did* have a reasonable basis for questioning Zaloudek and respondent concerning contraband. See Pet. Ill. Ct. App. Br. 17-18 (arguing Sprague had reasonable suspicion that there was contraband in the car); *id.* at 20-21 (arguing Brody had reasonable suspicion of contraband in the center console); PLA 15 (arguing Sprague had reasonable suspicion that there

was contraband in the car); *id.* at 17-18 (arguing Brody had reasonable suspicion that there was contraband in the car).

If this Court were to agree, the question presented would become entirely irrelevant to its disposition of this case, because the existence of reasonable suspicion is independently sufficient to support the constitutionality of police questioning. See, *e.g.*, *Hiibel* v. *Sixth Judicial Dist. Ct. of Nev.*, 124 S. Ct. 2451, 2458 (2004). Consequently, there would be absolutely no reason to grant the petition; petitioner has failed to identify a single lower court that has ever held that questioning at a traffic stop as to which officers actually *have* reasonable suspicion is impermissible. Under this scenario, petitioner would be seeking nothing more than simple error correction of the sort this Court consistently declines to perform.

5. *Consent.* As Justice Schmidt suggested in dissent from the Illinois Appellate Court's Order, the question presented could also be rendered moot if the Court were to find that respondent voluntarily consented to the search. See Pet. App. 14a (listing consent as "not the least of" the theories under which the case could be decided). The record is unclear regarding whether consent was actually given, when it might have been given, and whether it might have been voluntary.[5] Were this Court to find that respondent did give

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[5] The trial court agreed with respondent that the search was unconstitutional "whether or not consensual," Trial Court Order at 2, and thus did not decide the question of consent. It noted that respondent initially agreed to the search (though it did not make clear precisely when), but also found that she subsequently refused to look in the vehicle's center console, where the drugs were located. *Ibid.* The appellate court apparently reached no conclusion regarding the state of the factual record on the question of consent, as its description of the facts simply catalogues the conflicting accounts of the different participants in the encounter regarding whether or not respondent ever agreed to the search. See Pet. App. 4a (recounting Sprague's testimony that respondent gave consent to him); *id.* 5a (recounting Brody's testimony that

consent and that consent was voluntary, it would then have to address whether this would supersede any Fourth Amendment violation that might have taken place beforehand or afterward. See, *e.g.*, See *United States* v. *Ramos*, 42 F.3d 1160, 1164 (CA8 1994) (finding that the signing of a consent form mooted a prior Fourth Amendment violation), *cert. denied*, 514 U.S. 1134 (1995). The result of this inquiry could render unnecessary any consideration of whether the questioning constituted such a violation.

6. *Search incident to arrest.* Justice Schmidt also noted that Sprague's statement to Zaloudek that he would be arrested – made *before* Sprague asked for consent to search the vehicle – might mean that the search was justifiable as being incident to an arrest. See Pet. App. 13a. Indeed, language in the trial court's order that "[t]he arrest for driving revoked *had been made*," Trial Court Order at 2 (emphasis added), might be read to support that conclusion. If this Court were to uphold the search on this rationale, it would never reach the question presented.

* * * *

In sum, in order to use this case to resolve the constitutional questions that petitioner claims warrant this Court's attention, the Court would first need to determine that this was a traffic stop (as opposed to an accident investigation as a part of the officers' "community caretaking" function); that the officers' questions regarding contraband were unrelated to the (as-yet-undetermined) purpose of the investigatory stop, whenever it occurred; that there was no independent basis for the officers' suspicions that prompted their questioning; that the questions about contraband did not impermissibly extend the duration of the stop; that respondent did not give voluntary consent that would supersede any Fourth Amendment violation; and that the search was not

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respondent gave consent to him); *ibid.* (recounting respondent's denial that she gave consent to either officer).

otherwise justified as a search incident to arrest. If this Court were to decide otherwise on even a single one of these predicate questions – four of which have been contested by petitioner and two of which were asserted by a judge below – then it would find itself foreclosed from reaching the questions on which it granted certiorari and mired instead in adjudicating a set of contested factual disputes.

If this Court decides that it is necessary to provide greater guidance regarding the legal issues petitioner identifies, it surely need not do so in a case that depends on no fewer than six contingent, contested factual and legal inquiries. It should, instead, wait for a more appropriate case that squarely and cleanly presents the question. Such a vehicle should not be difficult to find: the cases cited by petitioner provide uncontroversial examples of officers clearly stopping motorists for traffic violations (rather than simply happening on the scene of an accident), issuing citations (rather than arresting the motorist), and conducting questioning regarding crimes unrelated to operation of the vehicle. See Pet. 6-7.

There is no reason to believe that this Court will have to wait long before another such case presents itself, and such a case would suffer none of the numerous defects present in this one. Where an officer exercises his authority to pull over the motorist, there is no question that a stop is involved; where the scope of the traffic violation is clear, it is straightforward to decide whether questions about contraband are unrelated to the purpose of the stop; where the suspect has done nothing beyond commit a moving violation, there is no question that the officer lacks reasonable suspicion to ask about contraband; and where the questioning takes place while the officer is otherwise processing the driver's citation, there is no potential claim that the questioning unreasonably extended the duration of the stop. Nor is such a case likely to present the complicated and unresolved issues of consent and arrest prior to the search that are present here. A case of that type surely presents a better vehicle for resolving the question

presented than the "unusual circumstances," Pet. App. 9a, of this case.

II. There Is No Actual Conflict Among the Lower Courts on the First Question Presented That Requires This Court's Intervention.

In any event, there is no split among the lower courts that merits this Court's review. See U.S. *Childs* BIO at 6-11. As petitioner correctly notes, "'[a] genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, *based on their holdings in different cases with very similar facts.*'" Pet. 8 (quoting STERN ET AL., *supra*, at 226 (emphasis added)). Petitioner's asserted conflict does not meet this standard.

1. In its attempt to demonstrate a split, petitioner cites nine cases decided by federal courts of appeals or state supreme courts. See Pet. 6-7.[6] To be sure, those courts use different verbal formulations in the course of their Fourth Amendment analysis. But they reach identical *results*: each of the courts concluded that under its test, however

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[6] Petitioner attempts to bolster its assertion that "numerous state courts of last resort" have considered the question it presents, Pet. 6, by citing decisions of intermediate appellate courts from five additional states. See *id.* at 6-7 (citing *State* v. *Middleton*, 43 S.W.3d 881 (Mo. Ct. App. 2001); *State* v. *Gibbons*, 547 S.E.2d 679 (Ga. Ct. App. 2001); *State* v. *Parkinson*, 17 P.3d 301 (Idaho Ct. App. 2000); *State* v. *Gaulrapp*, 558 N.W.2d 696 (Wis. Ct. App. 1996); *State* v. *Taylor*, 973 P.2d 246 (N.M. Ct. App. 1998)). Like the intermediate appellate decision on which petitioner seeks certiorari here, none of these decisions represents the last word of a state regarding the proper application of the Fourth Amendment, and any conflict among them would not merit this Court's attention. Cf. SUP. CT. R. 10(a), (b) (explaining that this Court usually grants certiorari to resolve conflicts among federal courts of appeals and/or "state court[s] *of last resort*" (emphasis added)).

articulated, the traffic-stop questioning at issue was permissible.[7] Thus, petitioner cannot show a true conflict.

Indeed, in only one of the cases petitioner identifies did a court hold that the Fourth Amendment had been violated. But the violation there stemmed not from unlawful *questioning* during the course of a traffic stop, but instead from unlawful *detention* after the stop was fully completed. See *Ramos*, 42 F.3d at 1164 ("[W]e believe that continuing to detain the defendants after their licenses and registration had been checked was a violation of the Fourth Amendment."). The police in *Ramos* kept one defendant in the patrol car for questioning even after having completed the investigation of the traffic violation by issuing a warning to the other. See *id.* at 1161-62. The Eighth Circuit determined that this additional detention was unsupported by any reasonable suspicion and was therefore unconstitutional. *Id.* at 1164. This unexceptional and correct application of *Terry* v. *Ohio* – see 42 F.3d at 1163 (citing *Terry*) – certainly does not create a circuit split. This is particularly true because the court went on to deny the suppression motion, holding that the

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[7] See *Burton*, 334 F.3d at 518-19 (holding that questioning did not render the stop unreasonable); *Childs*, 277 F.3d at 954 (holding that the questioning did not render the stop unreasonable); *United States* v. *Murillo*, 255 F.3d 1169, 1174 (CA9 2001) (holding that the officer's questions were supported by reasonable suspicion), *cert. denied*, 535 U.S. 948 (2002); *Holt*, 264 F.3d at 1217 (holding that the officer's question about the presence of a loaded weapon was justified on grounds of officer safety); *Ramos*, 42 F.3d at 1164 (holding that regardless of the permissibility of the questioning, the defendant voluntarily consented to the search); *Shabazz*, 993 F.2d at 437 (holding that the questioning did not exceed the proper scope of the stop); *Akuba*, 686 N.W.2d at 417 (holding that the questioning did not impermissibly extend the scope of the stop); *McKinnon-Andrews*, 846 A.2d at 1204-05 (holding that the officer's questions were supported by reasonable suspicion); *Gonzalez*, 789 N.E.2d at 270 (holding that the questioning did not render the stop unreasonable).

defendant's "voluntary signing" of a consent form authorizing the search of his car "was sufficiently an act of free will to purge the taint of the preceding illegal detention." *Id.* at 1164.

2. The cases cited by petitioner aptly illustrate why this Court should grant certiorari only for a "genuine conflict" rather than a "conflict of principle," STERN ET AL., *supra*, at 226. Because none of the cases resulted in the suppression of evidence, none of them gave the deciding court an opportunity to flesh out fully where it would draw the line of unreasonability under the Fourth Amendment as it relates to traffic-stop questioning. Only when and if future cases actually do suppress evidence will it be clear whether the lower courts have adopted conflicting approaches to the determination whether an officer committed a Fourth Amendment violation based on traffic-stop questioning. And only then would the Court be able to determine whether there exists a set of facts on which different lower courts would reach different results regarding suppression of evidence, and, if so, whether the set is significant enough to warrant certiorari.

The absence of clear conflict among the lower courts is most apparent in the four cases that did not ultimately turn on the issue of traffic-stop questioning at all. As discussed *supra*, *Ramos* turned on issues of detention and voluntary consent, rather than on the proper scope of questioning. Both *United States* v. *Murillo*, 255 F.3d 1169 (CA9 2001), *cert. denied*, 535 U.S. 948 (2002), and *State* v. *McKinnon-Andrews*, 846 A.2d 1198 (N.H. 2004), found that the questioning at issue was supported by the existence of independent reasonable suspicion. See *Murillo*, 255 F.3d at 1174; *McKinnon-Andrews*, 846 A.2d 1203-04.[8] Because this

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[8] Moreover, *McKinnon-Andrews* discussed the issue of traffic-stop questioning under the rubric of *state*, rather than federal, constitutional law. See 846 A.2d at 1201 ("We first address [petitioner's] claim under the State Constitution * * * and cite

finding was sufficient to render the questioning constitutional, it was irrelevant whether the traffic stop itself also might have justified the questioning, and the courts' discussions of that issue were unrelated to their ultimate holdings. See also *supra* at 16-17. And in *United States* v. *Holt*, 264 F.3d 1215 (2001) (en banc), the Tenth Circuit disposed of the only actual issue in the case by creating a narrow public-safety rule allowing suspicionless questioning about loaded weapons. See *id.* at 1228-30. Its further discussion – in the opinion of a separate majority – of the proper scope of traffic-stop questioning, see 264 F.3d at 1228-30, was dictum. See 264 F.3d at 1227 (opinion of Ebel, J.); *id.* at 1238 (opinion of Kelly, J.); see also U.S. *Childs* BIO at 10-11.[9]

Even those cases that did actually turn on the issue of traffic-stop questioning were so fact-dependent that they did not create sweeping constitutional rules that amount to a conflict among the lower courts. *United States* v. *Burton*, 334 F.3d 514 (CA6 2003), *cert. denied*, 540 U.S. 1135 (2004), simply held that "the scope and duration of the traffic stop in this case was reasonable," *id.* at 519, leaving for another day a definitive determination of what kind of traffic stop might be *un*reasonable. *Gonzalez*, 789 N.E.2d 260, held that requesting identification from a passenger did not "impermissibly prolong [the] defendant's detention" or "change[] the fundamental nature of the stop," *id.* at 270, but the facts of the case did not give the Illinois Supreme Court the opportunity to define what type of questioning might give

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federal authority for guidance only.") (citation omitted). The only federal issue in the case was resolved in a single sentence in the final paragraph, where the court correctly and unremarkably recognized that police questioning supported by reasonable suspicion does not violate the Fourth Amendment. See *id.* at 1204 (citing *Terry*).

[9] The Seventh Circuit has noted that this discussion was also dictum because the initial stop in *Holt* was a checkpoint stop rather than a traffic-violation stop. See *Childs*, 277 F.3d at 952.

rise to such constitutional infirmities. The remaining three cases all agreed that overly long questioning would violate the Fourth Amendment – see *United States* v. *Childs*, 277 F.3d 947, 952 (CA7), *cert. denied*, 537 U.S. 829 (2002); *United States* v. *Shabazz*, 993 F.2d 431, 437 (CA5 1993); *State* v. *Akuba*, 686 N.W.2d 406, 415 (S.D. 2004) – but since none of them held that the questioning at issue failed this standard, it remains unclear where each of these courts would draw the temporal line of unreasonability.

It would be premature for this Court to grant certiorari now to address the issue of traffic-stop questioning. Without more decisions in the lower courts, it is impossible to predict whether a true conflict among them will someday arise – that is, whether the courts' different verbal formulations of the Fourth Amendment's requirements will actually produce different results in factually similar cases. As of now, the courts' actual results have dovetailed. Moreover, even if such conflict were inevitable, this Court's consideration of the question would benefit from concrete examples of how different ways of articulating the reasonableness inquiry play out in different factual scenarios.

This Court should accordingly deny certiorari and allow the issue time to percolate in the lower courts.

3. Because petitioner demonstrates no conflict among the federal courts of appeals and state courts of last resort, it cannot demonstrate that this Court's intervention is necessary merely by citing two cases decided by the Illinois Appellate Court – *People* v. *Lomas*, 812 N.E.2d 39 (2004), and *People* v. *Leigh*, 792 N.E.2d 809 (2003) – and asserting that their results conflict with the Seventh Circuit's decision in *Childs*. See Pet. 8. Apparently, in neither of those cases did petitioner seek review in the Illinois Supreme Court, which would have been the proper forum to address any disagreement with those outcomes, particularly because those cases did not raise the various preliminary issues that make this case (which was presented to the state supreme court) an unsuitable vehicle for

resolving the question presented. Without allowing the Illinois Supreme Court to address the question whether its precedents have been properly applied, petitioner cannot present these cases as indicative of settled Illinois law. See also *supra* at 23 (noting that *Gonzalez* did not allow the Illinois Supreme Court to precisely define when questioning would be unconstitutional).

Potential disparities among lower state courts or district courts in applying state and federal appellate precedents do not require the time and attention of this Court. It is properly the role of the state courts of last resort and federal courts of appeals to directly supervise these lower courts and to assure that the law is applied consistently within each jurisdiction. This is particularly true with respect to heavily fact-intensive questions such as reasonableness under the Fourth Amendment. Principles of sound judicial administration thus counsel strongly in favor of denying certiorari and instead waiting to determine whether an actual conflict develops that cannot be resolved satisfactorily in any other court.

III. Petitioner's Second Question Presented Provides No Additional Claims That Warrant This Court's Review.

Petitioner purports to identify two distinct questions presented by this case: first, what limits does the Fourth Amendment impose on traffic-stop-related questioning (see *supra*), and second, do any of those limits arise out of this Court's decision in *Terry* v. *Ohio*, 392 U.S. 1 (1968)? As with the first question, petitioner waived this second, "methodological" question, Pet. 11, by failing to raise it below. See *supra* at 1-2; see also *id.* at 7, 8.

In any event, while the second question may perhaps raise methodological claims of academic interest, these claims lack any substantial practical consequence and this case provides an exceptionally poor vehicle for resolving them. The reason is simple: *Terry* involves "investigative" encounters between police and civilians, rather than seizures

based on probable cause to believe that a crime has been committed. For reasons respondent has already explained, however, the record in this case is ambiguous as to the temporal relationship between when the seizure in this case occurred and when the officers involved had probable cause to believe that any crime had occurred. See *supra* at 14-16. If, as respondent has consistently argued, the seizure in this case occurred when Trooper Sprague pulled up at the scene of accident and decided to prohibit anyone from leaving the scene while he investigated the fender bender, then this case involves a quintessential *Terry* situation. At that point, Zaloudek and respondent were already stopped "without the trooper's direction." Trial Court Order at 1. Nothing in the record shows that at that point Sprague had reasonable suspicion, let alone probable cause, to believe that Zaloudek or respondent had committed any crime. Indeed, nothing in the record shows that any vehicle-related crime *other* than driving with a revoked license (a crime as to which Sprague could have had no inkling until after his investigation was underway) *ever occurred*. By contrast, the mine run of cases to which petitioner points involve uncontroversial cases of probable cause, because they involve police-initiated contacts based on officers' observation of moving violations.

Even if this difficulty were somehow resolved and some clear "traffic stop" and seizure were identified, see *supra* at 11-12, 14-16, the second question simply repackages the first and thus adds nothing to this Court's consideration of the case. The result the Court reaches on the first question will necessary dictate the result it reaches on the second. The appellate court agreed with respondent that the officers' questioning was unrelated to the original purpose of the officers' investigation. Pet. App. 8a, 10a. If this determination is both correct and legally significant, then *Terry* unambiguously supplies the proper standard for evaluating the officers' conduct. Assuming there was a traffic stop in the first place, the additional, unrelated questioning would nevertheless have constituted a separate police

encounter unsupported by probable cause and thus governed by *Terry*.

An examination of the cases cited by petitioner confirms that the second question merely restates the first and does not present an independent ground for granting certiorari. Even as to the question whether *Terry* should apply to police-motorist encounters stemming from traffic stops based on officers' observations of moving violations, the circuit split identified by petitioner is speculative at best. None of the cases it identifies supports the conclusion that the broader "methodological" disagreement over the applicability of *Terry* has arisen in any circumstance other than questions posed to occupants of vehicles based on less than reasonable suspicion.[10]

Several of the cases cited by petitioner do not implicate *Terry* in any way. See *United States* v. *Garcia*, 376 F.3d 648, 650-51 (CA7 2004) (upholding search of defendant's *house* because he was under arrest for driving without a license and while intoxicated); *Mena* v. *City of Simi Valley*, 332 F.3d 1255 (CA9 2003) (involving questions during a seizure based on search warrant of a *home*), *vacated and remanded sub nom. Muehler* v. *Mena*, 125 S. Ct. 29 (2004).[11] Several other

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[10] As noted *supra* at 13 & n.3, all courts agree that it may be unreasonable under the Fourth Amendment to prolong the encounter without at least reasonable suspicion, regardless of whether they apply *Terry* or not. Thus, *Purcell*, 236 F.3d 1274, 1277-79 (CA11 2001); *Barch* v. *State*, 92 P.3d 828 (Wyo. 2004); *United States* v. *Wellman*, 185 F.3d 651, 656 (CA6 1999); and *State* v. *Dickey*, 706 A.2d 180, 184 (N.J. 1998) (noting that the court focused "on the duration of this stop"), to the extent they turned on the length of the detention, are not implicated by this question.

[11] Because *Mena* involved questioning during the course of executing a lawfully obtained search warrant, nothing in the Court's decision there should affect the outcome in this case.

cases involved open-air canine sniffs of vehicles, see *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643, 645 (CA8 1999); *Barch* v. *State*, 92 P.3d 828 (Wyo. 2004), and any uncertainty on these facts was addressed by this Court's recent decision in *Illinois* v. *Caballes*, 125 S. Ct. 834 (2005).

The remaining cases cited by petitioner all revolve around police questioning of occupants of lawfully detained vehicles, the exact circumstance implicated by the petition's first question presented. See, *e.g.*, *Childs*, 277 F.3d at 952-54; *United States* v. *Purcell*, 236 F.3d 1274, 1279-80 (CA11 2001).[12] Thus, petitioner's recapitulation of the first question presented does not capture any additional cases or circumstances beyond those noted in the first question.[13]

Finally, petitioner's brief, unsupported suggestion that the Court should GVR in light of *Caballes*, see Pet. 16, lacks any foundation. *Caballes* concerned whether a canine drug sniff constituted a search in the first place, whereas this case is about the very different issue of whether police questioning that preceded such a sniff comported with the Constitution. Petitioner concedes, as it must, that the Illinois Appellate Court did not rest its decision on whether the canine sniff of the car violated the Fourth Amendment, see Pet. 5, n.*, and thus there would be no reason for the court of appeals to reconsider its ruling in light of *Caballes*.[14]

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[12] Petitioner's reliance on the Minnesota Supreme Court's decision in *State* v. *Askerooth*, 681 N.W.2d 353 (2004), is particularly misplaced, as the Minnesota court ultimately decided the case on state constitutional grounds. See *id.* at 361-71.

[13] The complicated and detailed analysis necessary to reveal the complete overlap of cases between the first and second questions again demonstrates how fact-specific any determination of the questions presented in this petition will be. A case with a clearer record and fewer ancillary issues would present a better vehicle.

[14] If petitioner's claim is instead that *Caballes* somehow bears upon the correctness of the *Gonzalez* rule, this argument has been

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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waived by petitioner's failure to raise any challenge below to *Gonzalez*. See *supra* at 1-2; see also *supra* at 7, 8.

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(3)

No. 04-1066

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

MICHELLE L. BARTELS, RESPONDENT.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

There is a deep and enduring split over whether the Fourth Amendment prohibits a police officer, during a lawful traffic stop, from questioning the motorist about matters (*e.g.*, the presence of drugs or guns in the vehicle) unrelated to the traffic violation that justified the stop. Among federal courts of appeals and state courts of last resort, four require no independent justification for such questions; at least three prohibit such questions absent reasonable suspicion; and two require reasonable suspicion if the questions change the fundamental nature of the stop. Pet. 6-8. This split, which has been acknowledged by commentators and lower courts alike (*id.* 8-9), is ripe for resolution. So, too, is the related split over whether the *Terry* doctrine governs in this context. *Id.* 11-14.

Respondent asserts that this case is a poor vehicle to resolve those splits. Opp. 10-20. As shown in Section I, *infra*, her arguments ignore fundamental certiorari principles and are meritless. Her argument that the splits are not "genuine" (Opp. 20-28), is equally meritless, as shown in Section II, *infra*.

I. This Case Presents an Ideal Vehicle to Resolve the Questions Presented.

A. The Factual Record Is Complete and Clear.

Respondent contends that this case "involves a complicated factual scenario," suffers from factual "ambiguities," and can be resolved only "on the basis of a highly stylized version of the facts." Opp. 1, 2, 16. To support her contention, respondent cites what she characterizes as holes in the record and the trial court's order. *Id.* 1-7.

Respondent's focus on the record and the trial court's order disregards the settled principle that, for purposes of this Court's review, the governing facts are those articulated by the highest

state court to reach the merits. See *Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("in the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue"); *Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952) (accepting the state supreme court's factual findings because "they are not without factual foundation"). Here, the opinion below very plainly sets forth the relevant events and chronology of the traffic stop. Pet. App. 3a-5a. Respondent does not and could not argue that those facts are in any way ambiguous or incomplete, or that they fail to provide an adequate factual predicate for this Court's review of the questions presented. Opp. 7-8 (summarizing opinion below). Accordingly, the supposed ambiguities that respondent discerns in the record and the trial court's order (see *id.* 2-6) pose no obstacle to certiorari.

In a further effort to muddy the facts, respondent thrice mentions the appellate court's reference to the "unusual circumstances of this case." Pet. App. 9a (cited in Opp. 12, 14, 20). But context reveals that the court found this case "unusual" simply because two officers, rather than one, asked respondent about contraband. *Ibid.* ("Under the unusual circumstances of this case, our analysis does not end with Officer Sprague. Because the investigation was still in progress and had yet to be completed, we must apply the *Gonzalez* test to Officer Brody's questions as well."). Because the same Fourth Amendment analysis applies to both officers' inquiries, the fact that two officers posed materially identical questions to respondent does not affect, let alone forestall, this Court's resolution of the questions presented.

B. No Preliminary Issues Will Prevent the Court from Reaching the Questions Presented.

Respondent counts six (!) supposedly "antecedent" issues that would prevent this Court from reaching the questions presented. Opp. 2, 10-20. Respondent is incorrect. None of

those issues is raised in the petition, and none poses an obstacle to resolving the questions presented.

One of respondent's "antecedent" issues concerns the duration of the traffic stop. Opp. 12-14. Respondent argues that because "the trial court's order contains no factual findings" regarding duration, this Court cannot determine the stop's constitutional validity. *Id.* 13-14. In so arguing, respondent again forgets that it is the appellate court's opinion, not the trial court's order, that is under review. The appellate court relied exclusively upon the scope of the stop, not its duration, in holding that the officers' questions violated the Fourth Amendment. Pet. App. 9a ("Regardless of the length of the detention, asking [respondent] if she had anything illegal in the car went well beyond" the purpose the stop). Accordingly, this matter comes to the Court as a pure "scope of the stop" case, not a "duration of the stop" case, and therefore provides an appropriate vehicle to answer the questions presented. See *Illinois v. Caballes*, 125 S. Ct. 834, 837 (2005) (distinguishing scope issue, which concerned use of a drug-detection dog at the traffic stop, from duration issue).[1]

The five other issues identified by respondent — whether the encounter was a traffic stop, whether the officers' questions were reasonably related to the stop, whether the officers had

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[1] Respondent in *Caballes* opposed certiorari on the same ground as respondent here. See Brief in Opposition, No. 03-923, at 4-5, 8 (arguing that opinion below presented duration issue). Illinois replied in *Caballes*, as it does here, that the state court relied solely upon the scope of the stop, not its duration, in finding a Fourth Amendment violation. See Reply in Supp. of Pet. for Cert., No. 03-923, at 1-2. This Court granted certiorari, and then held that duration, having played no role in the decision below, did not affect analysis of whether the canine sniff expanded the scope of the stop. See *Caballes*, 125 S. Ct. at 837.

reasonable suspicion to ask questions about contraband, whether respondent consented to the search, and whether the ensuing search was incident to arrest (see Opp. 11-12, 14-18)—are neither raised in the petition nor fairly included in the questions presented. Respondent's suggestion that Illinois may seek to smuggle those issues into its merits briefs, see *id.* 12 ("[Illinois has downplayed, perhaps only temporarily, its factual claims about the nature of the encounter in this case"), is without foundation. See Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); R. STERN, ET AL., SUPREME COURT PRACTICE 409-410 (8th ed. 2002). There is no prospect that the Court will have to wade through those issues, let alone resolve them in a certain way, in order to reach the questions presented.[2]

Before moving on, a brief reply to respondent's suggestions that the encounter here might not have been an actual traffic stop. See Opp. i, 11-12. To be clear, there was a traffic stop, and thus a Fourth Amendment seizure, by the time the officers questioned respondent about contraband. True, respondent initially pulled over to the shoulder on her own accord. Pet. App. 3a. However, moments later, "Officer Sprague told [respondent's companion] he was going to be arrested for

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[2] The point is illustrated by *Caballes*. There, Illinois unsuccessfully argued in state court that the officers had reasonable suspicion, then necessary under Illinois precedent, to conduct an exterior canine sniff of a vehicle at a traffic stop. See *People v. Caballes*, 207 Ill. 2d 504, 509-510, 802 N.E.2d 202, 204-205 (2003). Illinois did not seek certiorari on that issue, but instead presented only the question whether reasonable suspicion was necessary in the first place. This Court granted certiorari and resolved that question. See *Caballes*, 125 S. Ct. at 837-838. The fact that Illinois had unsuccessfully advanced *other* arguments in the state courts did not forestall certiorari because Illinois did not present those other arguments in its petition. The same principle obtains here.

driving on a revoked license." *Ibid.* At that point, the encounter unquestionably ripened into a Fourth Amendment seizure based upon a perceived traffic violation. And only after that point did the officers question respondent about contraband in the car. *Id.* 4a-5a. Thus, the questioning indisputably took place during a probable cause-based traffic stop.[3]

C. Illinois Did Not Forfeit Its Positions on the Questions Presented.

Respondent contends that Illinois forfeited its positions on the questions presented by not advancing them in the state courts. Opp. 1-2, 8, 25. This contention ignores the difference between a petitioner's "claim" and the "arguments" that the petitioner may make in this Court to support that claim.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Both here and in the state courts, Illinois has advanced precisely the same claim: the officers' questions at the traffic stop did not violate the Fourth Amendment. Settled precedent permits Illinois to present new arguments — including that the officers needed no reasonable suspicion to question respondent about matters unrelated to the justification for the traffic stop, and that *Terry* does not govern the validity of those questions — to support that claim in this Court. See *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Lebron's contention that Amtrak is part of

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[3] Respondent twice notes Justice Schmidt's comment in dissent that the encounter "clearly was not" a "routine traffic stop." Pet. App. 11a (quoted in Opp. 1, 11). In context, Justice Schmidt meant not that the encounter was something other than a "traffic stop," but rather that the stop was not "routine" because respondent moved from the passenger seat to the driver's seat after the car pulled over but before the first officer arrived. *Ibid.*

the Government is in our view not a new claim * * *, but a new argument to support what has been his consistent claim: that Amtrak did not accord him the rights it was obliged to provide by the First Amendment."); *Yee*, 503 U.S. at 535 (because petitioners "raised a taking claim in the state courts," they "could have formulated any argument they liked in support of that claim here"). Illinois practice has long been in accord. See, *e.g.*, *People v. Roberson*, 212 Ill. 2d 430, 440, 819 N.E.2d 761, 767 (2004), citing *Dineen v. City of Chicago*, 125 Ill. 2d 248, 265-266, 531 N.E.2d 347, 354 (1988) (forfeiture rule, which is discretionary, applies where issue is "not discernible from an examination of the proceedings in the courts below").

Even if Illinois' arguments on the two questions presented were characterized as "claims" rather than "arguments," there still would be no forfeiture. When this case was before the state courts, the Illinois Supreme Court had just decided *People v. Gonzalez*, 204 Ill. 2d 220, 226, 789 N.E.2d 260, 265 (2003), and *People v. Bunch*, 207 Ill. 2d 7, 15-17, 796 N.E.2d 1024, 1030-1031 (2003), cert. denied, 541 U.S. 959 (2004). As respondent recognizes (Opp. 2, 7, 8, 9), those cases held, adversely to Illinois, that *Terry* governs investigatory conduct unrelated to the traffic violation that justified the traffic stop, and that unrelated questioning at the stop violates the Fourth Amendment. It would have been futile in this case for Illinois to continue pressing its recently-rejected views below.

Under analogous circumstances — where lower court precedent rejected a party's position on a particular legal question[4] — this Court has routinely held that there was no

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[4] While this case was pending in state court, Illinois sought certiorari in *Illinois v. Bunch*, 541 U.S. 959 (2004). Illinois could not seek certiorari in *Gonzalez* because the Illinois Supreme Court, while adopting an unfavorable rule of law, gave Illinois the judgment. See *Mathias v. WorldCom Tech., Inc.*, 535 U.S. 682 (2002).

forfeiture for purposes of review in this Court. See, *e.g.*, *United States v. Vonn*, 535 U.S. 55, 58 n.1 (2002); *Lebron*, 513 U.S. at 379; *United States v. Williams*, 504 U.S. 36, 43-45 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). This is particularly true where, as here, the court below "passed upon" the question presented in the petition. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991).

II. There Is a Deep, Intractable and Genuine Split on the Questions Presented.

Among federal courts of appeals and state courts of last resort, there is a deep split over whether the Fourth Amendment prohibits a police officer from questioning motorists about matters, such as the presence of contraband, unrelated to the traffic violation that justified the traffic stop. In addition to Pet. 6-8 (citing nine decisions), see *Campbell v. State*, 97 P.3d 781, 785 (Wyo. 2004) ("an officer generally may not ask the detained motorist questions unrelated to the purpose of the stop, including questions about controlled substances, unless the officer has reasonable suspicion of other illegal activity"). Two other such courts have acknowledged the split but declined to take sides. Pet. 8. Intermediate appellate courts in five States have joined the fray. *Id.* 6-7.

Respondent argues that there is no genuine conflict, but that the lower courts simply use "different verbal formulations in the course of their Fourth Amendment analysis." Opp. 20. That argument is preposterous. When several courts require an officer to have reasonable suspicion before asking a motorist about contraband, while several other courts impose no such requirement, the difference is a matter not of semantics, but of fundamentally incompatible legal rules. Thus, if a law enforcement officer in Illinois, having made a lawful traffic stop, questions the motorist about drugs but has no reasonable suspicion for doing so, whether the officer will be found to have violated the Fourth Amendment depends entirely upon whether